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Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
OAKLAND CANNABIS BUYERS' COOPERATIVE,
and
JEFFREY JONES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF SHERIFF MARK N. DION (CUMBERLAND COUNTY, MAINE), (MAINE) SENATOR ANNE RAND, (CALIFORNIA) SENATOR JOHN VASCONCELLOS, NEW MEXICO GOVERNOR GARY JOHNSON, AND DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[*]

Amici Curiae Mark N. Dion, Anne Rand, John Vasconcellos, and Gary Johnson are among the thousands of State and local government officials who have worked to enact and enforce State measures aimed at meeting the medical needs of those seriously ill persons for whom marijuana has proven to offer otherwise unavailable relief. *Amicus* DKT Liberty Project is a not-for-profit organization founded in 1997 with the aim of promoting and protecting civil liberties. It has actively supported these innovative State and local government efforts to safeguard the rights and interests of the seriously ill.

Although no question of the legality of these State measures is before the Court in this case – and we believe that the questions of Federal law that *are* squarely presented may be resolved exclusively through ordinary statutory interpretation tools – we are concerned that this case not be resolved based on misperceptions about the purpose or effect of these laws and that it not be decided in a manner that "pretermit[s] . . . responsible solutions being considered" at the State level. *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment).

SUMMARY OF ARGUMENT

This case arises at a time of significant change in the scientific, legislative, and public opinion climate concerning the use of marijuana for therapeutic purposes by persons suffering from acute pain and debilitating illness. Rigorous scientific evidence documenting the specific benefits of marijuana for particular medical conditions is accumulating, *see* National Academy of Sciences/Institute of Medicine, *Marijuana & Medicine: Assessing the Science Base* (1999) ("IOM Report"), and this body of evidence – along with increased discussion and

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[*] Consent to file this Brief has been sought and obtained from both parties. Pursuant to this Court's Rule 37.6, *Amici* attest that no counsel for a party had any role in authoring this Brief and no outside party has made a monetary contribution for its preparation or submission.

debate about the needs and autonomy claims of those suffering from intolerable pain and terminal illness – has so far persuaded thirty States to adopt legal rules that, in various ways, express the conviction that use of marijuana by a narrow class of seriously ill persons is not the sort of conduct that should give rise to criminal punishment or civil liability.

Although, as described herein, these State responses differ from one another in significant ways – some are avowedly symbolic; others establish intricate State-administered patient registration systems, and still others provide an affirmative defense against charges of possession or cultivation of small amounts of marijuana – this variety should not obscure fundamental points of commonality. First, these measures are concerned *exclusively* with individuals suffering from serious illness whose conditions are likely to benefit from marijuana – a class whose existence has been confirmed by the Institute of Medicine's authoritative study, and the contours of which research is defining with increasing precision. Such measures, which are consistent with the States' historic power to protect the health and well-being of their citizens, *see Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960), have neither the purpose nor the effect of thwarting the Federal and State statutes that punish trafficking in marijuana or proscribe its possession for recreational use. Many of the measures viewed as the most aggressive are modest in actual operation – Alaska's program has an estimated 180 enrollees, and Oregon's has approximately 1,675 – and these same States, through their own courts, not only continue to punish those who engage in the marijuana trade, but have been vigilant in assuring that new protections for the grievously ill not become a shield for lawbreakers.

Nor are these developments the only significant changes in the background against which this case will be decided. Petitioner informs the Court, *see* Pet. Br. at 27 n.12, that the

U.S. Department of Health and Human Services will soon release *its* view of the scientific evidence concerning marijuana and health – as part of the disposition of a petition to reschedule marijuana, *see* 21 U.S.C. § 811(b). And as Petitioner's *Amici* repeatedly emphasize, the Institute of Medicine Report held out the hope that in coming years drugs derived from marijuana will be developed that will offer the same benefits with fewer adverse effects. *See* Br. *Amicus Curiae* of Family Research Council at 9.

This case, it should be underscored, does not call upon the Court to make an explicit *legal* judgment about any of these developments. Petitioner has not sought a declaration that any California law is unenforceable, *see* Pet. Br. at 9 n.6; 28 U.S.C. § 2403(b), and, as will be made clear below, it is not, in fact, necessary that the Court take cognizance of these developments to answer the narrow statutory question the case squarely presents. Rather, basic tools of statutory construction establish that the Court of Appeals was correct to hold that the equity jurisdiction conferred by 21 U.S.C. § 882 includes the full measure of traditional discretion, including authority to modify or dissolve injunctions when the public interest so requires. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987).

Nor is it essential that the context be taken into account were the Court to undertake to resolve the much broader statutory question that the United States urges upon it. As will also be shown below, if the availability *vel non* of a necessity defense is to be taken up, ordinary statutory construction rules are also adequate in themselves to defeat Petitioner's argument that the Controlled Substances Act ("CSA") includes an (implicit) abrogation of the common law defense of medical necessity.

The evidence concerning scientific and legislative developments, we believe, does supply further reason for rejecting Petitioner's statutory argument – or, at least, for leaving the necessity question for a case in which it is squarely

presented. It is contrary to usual principles of judicial restraint, *see, e.g.*, *United States v. Raines*, 362 U.S. 17, 22 (1960), to resolve questions – whether, for example, an individual charged with criminal marijuana possession, *see* 21 U.S.C. § 844, may raise the defense of necessity – in a case arising out of a *civil* proceeding involving a *different* statutory provision, *see* 21 U.S.C. § 841(a)(1). And to the extent that Petitioner has evidence concerning conduct by *these particular Respondents* that is inconsistent with a claim of medical necessity, *see, e.g.*, Pet. Br. at 35 n.16, such allegations go to the propriety of the particular order issued in this case and cannot establish that there is *no set of facts* under which a necessity defense could be sustained. Indeed, though Petitioner has shown limited interest in having this case decided according to its particular facts – or in pressing for an injunction that better incorporates the safeguards it insists are necessary to prevent "abuse or diversion of the drug," *id.* at 26 n.11, it has had ample opportunity to do so – including in a still-pending Ninth Circuit appeal.

But if the Court is to venture an answer to the broadly-framed question, principles requiring that Federal statutes be construed so as to avoid difficult constitutional questions, and in a manner that takes due account of the States' role, argue strongly that a necessity defense has not been abrogated. *See Solid Waste Agency v. United States Army Corps of Engineers*, 121 S. Ct. 675, 683 (2001); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1870 (2000); *Jones v. United States*, 526 U.S. 227, 239 (1999). First, the enforcement of laws criminally punishing marijuana possession would, in cases of suffering individuals with no effective therapeutic alternative, raise real and substantial constitutional questions. To the extent that an individual could show that he would suffer intolerable pain – or risk death – as a consequence of the government's refusal to allow him to possess marijuana, *Jenks v. Florida*, 582 So. 2d 676, 680 & n.4 (Fla. Ct. App. 1991), the Constitution's basic protections

against unjustifiable intrusions on individual liberty would be implicated. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905). The ultimate disposition of such a constitutional claim would then require assessment, *inter alia*, of the asserted governmental interests, the availability of less burdensome alternatives, and the existence of a practicable remedy. *See generally Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

This Court should construe the statute at issue in this case so as to postpone, rather than hasten, the day when such constitutional questions must be definitively resolved. Both the process of constitutional adjudication and that of self-government are advanced by allowing these complex questions – involving sensitive matters of public administration, science, and morality, as well as law – to continue to receive serious and thoughtful attention at the State level. *See Glucksberg*, 521 U.S. at 788-89 (Souter, J., concurring in judgment); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Indeed, it is a testament to the approach that Justice Brandeis extolled that Petitioner's *Amici*, in the service of their argument for a maximal reading of the Federal statute, attempt comparisons based on the outcomes of the diverse policies pursued by the fifty States. *See* Br. *Amicus Curiae* of Institute on Global Drug Policy of the Drug Free America Foundation, *et al.*, App. 6.

In arguing for caution here and for respect for the good-faith efforts of the States to exercise their police powers in a manner that gives meaningful protection for significant personal liberty interests, we do not maintain that there is no limit to State "experimentation" under the Act – or that injunctive relief must be denied whenever there is a State policy supportive of a particular necessity claim. To the contrary, in settings where core congressional power is implicated and where the text and policy of the statute are clear and strong, the States must recede.

See 21 U.S.C. § 903 (providing for preemption when – but only when – there is a "positive conflict"). But in an instance where a State is acting carefully – on a matter of its core historic concern – and in a manner that respects clearly expressed congressional intent and is consistent with traditional constitutional and equitable limitations on the reach of the law, courts exercising Federal equity power should tread carefully, if at all.

ARGUMENT

I. Basic Statutory Construction Tools Establish the Correctness of the Appeals Court Decision.

In arguing for reversal, Petitioner urges this Court to make two separate and large interpretive leaps. The Court is asked to hold both: (1) that in conferring on Federal and State courts the power to enjoin violations of the CSA, *see* 21 U.S.C. § 882, Congress (silently) withheld the flexibility and discretion that are the acknowledged hallmark of the equity jurisdiction; *and* (2) that, by placing marijuana in Schedule I, the 91st Congress (by implication) abrogated a common law medical necessity defense. Ordinary statutory construction tools are sufficient in themselves to show the error of each proposition.

A. Congress Did Not Withhold Traditional Discretion.

Although Petitioner seeks to have this case decided on the broad ground that considerations of medical necessity are not cognizable in *any* proceeding, civil or criminal – in any way pertaining to a Schedule I substance – whether involving importation, distribution, or mere possession, *see infra*, the question most squarely presented is whether the grant of power contained in *section 882* should be construed as *requiring* Federal courts, sitting in equity, to enjoin any conduct that appears to be inconsistent with the substantive prohibitions of the CSA. As is shown convincingly and in finer detail in the Respondents' Brief, settled precedent directs a negative answer to that question.

In *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944), *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 329-30 (1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), this Court affirmed that when a court exercises jurisdiction under a Federal statute providing for injunctive relief, it is presumed to have the full range of equity powers at its disposal, unless a contrary intent appears plainly in the text of the statute. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied"); *Miller v. French*, 120 S. Ct. 2246, 2255 (2000) ("we should not construe a statute to displace courts' traditional equitable authority absent the 'clearest command'") (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)); *see generally Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

Thus, rejecting arguments that Congress's enactment of the Emergency Price Control Act of 1942, 56 Stat. 23, had deprived a court of discretion to withhold injunctive relief, the *Hecht* Court explained:

> We are dealing here with the requirements of equity practice with a background of several hundred years of history . . . . The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

321 U.S. at 329-30. "[I]f Congress desired to make such an abrupt departure from traditional equity practice as is

suggested," *Hecht* continued, "it would have made its desire plain." *Id.* And *Romero-Barcelo* made clear that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances." 456 U.S. at 313; *see also Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 171 (2000) ("[d]enial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations to deter").

Petitioner's argument against equitable discretion is considerably weaker than in those cases. Where this statute's terms provide simply that courts "shall *have jurisdiction* . . . to enjoin violations of [the CSA]," the law held insufficient to curb discretion in *Hecht* provided that upon a showing that the defendant "is about to engage in *any* . . . acts or practices [against the law], a permanent or temporary injunction, or other order *shall be entered* without bond." 56 Stat. 33 (emphasis added). *Cf. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion.").[1/]

Nor would there be a plausible basis for believing that Congress intended for injunctions to be non-discretionary in this setting. First, ensuing history strongly suggests that Congress would have expected civil proceedings under the CSA to be a somewhat exotic alternative to the criminal prosecutions

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[1] And as Justice Rutledge observed – dissenting from a decision holding that the Emergency Price Control Act provisions governing the award of damages did not displace courts' power to award monetary restitution in their equitable discretion – "[i]t is not excessive to say that perhaps no other legislation in our history has equalled the Price Control Acts in the wealth, detail, precision and completeness of its jurisdictional, procedural and remedial provisions." *Warner Holding Co.*, 328 U.S. at 404 (Rutledge, J., dissenting).

that have always been the mainstay of the Act's enforcement.[2] Thus, this is not a case where the party enlisting the aid of equity would have no adequate remedy at law, nor is it an instance seeking prevention of an injury of truly irreparable character. *Compare Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173-75 (1978) (concluding that only an injunction could vindicate the objectives of the Endangered Species Act), *with Romero-Barcelo*, 456 U.S. at 314 (noting that statutory purposes could be accomplished through the availability of "fines and criminal penalties"); *see also Friends of the Earth*, 528 U.S. at 171 (noting district court's reliance on civil penalties for deterrence).[3]

Of equal import, this case – involving, *inter alia*, the efforts of AIDS patients to secure a substance that the Institute of Medicine, in a recent, comprehensive study *commissioned by the United States*, pronounced to be "promising treatment," for their condition, *see infra* – would be an odd candidate for holding that Congress had, *sub silentio*, repudiated "the qualities of mercy and practicality" that this Court has identified as the "essence" of the equity jurisdiction. *Cf. Jacobson*, 197 U.S. at 38-39 (suggesting that in hypothetical case seeking to enforce compulsory vaccination statute against person whose "particular condition of . . . health or body" would make administration of the vaccine "cruel and inhuman," the judiciary

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[2] As the District Court noted, the entire thirty-year history of the CSA has yielded only five reported decisions involving section 882(a). *See United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1104 (N.D. Cal. 1998).

[3] Indeed, though section 882(b) provides for "trial . . . by a jury in accordance with the Federal Rules of Civil Procedure" for those who violate injunctions, wholesale resort to that mode of proceeding would raise distinct constitutional questions. *See, e.g., International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 840 (1994) (Scalia, J., concurring).

would "be competent to interfere and protect the health and life" of "the individual concerned"); *cf. generally Chrysler Corp. v. United States*, 316 U.S. 556, 570 (1942) (Frankfurter, J., dissenting) ("A court of equity is not just an umpire between two litigants . . . the public interest is in its keeping as the conscience of the law. The circumstance that one of the parties is the Government does not in itself mean that the interest which it asserts defines and comprehends the public interest which the court must vindicate.").

B. The Statute Does Not Abrogate a Medical Necessity Defense.

Although this Court need not – and probably should not, *see infra* – decide the necessity defense question at the high level of abstraction that the United States demands, traditional statutory construction tools also establish that, if the question of abrogation is to be decided wholesale, it should be resolved for Respondents.

As Respondents point out, this Court has *never* construed a Federal statute as having entirely abrogated a common law justification defense, such as necessity or duress, *see United States v. Bailey*, 444 U.S. 394, 415-16 & n.11 (1980) (noting that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law," but holding that facts of that case would not support a necessity defense) (citing *Morissette v. United States*, 342 U.S. 246 (1952)), and such a drastic departure from settled legislative practice should not be found absent an unmistakably clear congressional statement. *See* Model Penal Code § 3.02(1)(c) (intent to abrogate justification defense should "plainly appear" in criminal statute).

Although Petitioner has argued that the text and structure of the CSA would satisfy any clear statement requirement, its near-exclusive reliance on Congress's placement of marijuana on Schedule I puts far greater weight on that particular

legislative action than it fairly may bear. In fact, the meaning Petitioner would have the Court ascribe to Congress's 1970 action is not the most plausible interpretation – let alone an inescapable one. Most fundamentally, contrary to Petitioner's drumbeat argument, *see, e.g.*, Pet. Br. at 14, 22, the placement *by Congress* of a substance in Schedule I *does not* equate automatically to a "*determination*" that marijuana "'has no currently accepted medical use in treatment in the United States,'" or has no "'accepted safety for use . . . under medical supervision.'" *Id.* (quoting 21 U.S.C. § 812(b)(1)(B) and (C)).

Rather, the text and structure of the statute make it plain that Congress *is not* bound by the same criteria as would be the Attorney General or the Drug Enforcement Agency in deciding a reclassification petition. Indeed, Congress has repeatedly affirmed this understanding, *see* H.R. Rep. No. 98-534, at 4 (1983), *reprinted in* 1984 U.S.C.C.A.N. 540, 543 (explaining legislation placing in Schedule I a drug – methaqualone – which previously had been approved by the FDA, by noting that "the [DEA] may not, in the absence of Congressional action, subject drugs with a currently accepted medical use in the United States to Schedule I controls"); *see also* Hillary J. Farias and Samantha Reed Date-Rape Prohibition Act of 2000, Pub. L. No. 106-172 (directing Attorney General, "notwithstanding sections [811(a), 811(b), 811(c) and 812)], to issue a final order placing GHB [gamma-hydroxybutyrate] in [Schedule I]").

National Organziation for Reform of Marijuana Laws (NORML) v. Bell, 488 F. Supp. 123, 139 (D.D.C. 1980), underscores this point. In that case, plaintiffs challenging the constitutionality of placement of marijuana on Schedule I argued strongly that it did not satisfy the statutory criteria. That contention, the district court explained, misconceived the statutory scheme: "Even assuming, arguendo, that marijuana does not fall within a literal reading of Schedule I," *NORML* explained, "[p]lacing marijuana in Schedule I furthered . . .

regulatory purposes of Congress," *id.* at 140; *see also id.* at 138-39 (explaining that "[t]he statutory criteria of Section 812(b)(1) are guides . . . but they are not dispositive" and noting Congress's "fear[]" that lighter penalties for marijuana "would create the impression that marijuana use was acceptable"). In sum, the core premise of Petitioner's argument – that Congress *actually* and *necessarily* resolved the question of medical necessity in 1970 – is a mistaken one. *Cf. Schiro v. Farley*, 510 U.S. 222, 236 (1994).[4]

Indeed, the contemporaneous history establishes with unusual clarity that the interpretation that the Petitioner insists is the *only* possible meaning of Congress's 1970 action – *i.e.*, that the placement of marijuana in Schedule I expressed an affirmative "declaration" or "determination" – is not really a tenable one. Recognizing that it was *not* in a position to make

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[4] The other arguments from the "statutory scheme" are no more persuasive. First, the existing statutory regime makes no provision for individuals who have in good faith exhausted all approved treatments, and its processes for rescheduling – which, in a prior instance, dragged on for nearly twenty-two years, *see Alliance for Cannabis Therapeutics v. Drug Enforcement Administration*, 15 F.3d 1131 (D.C. Cir. 1994) – provide no meaningful alternative for individuals whose life expectancy is measured in months. As for the argument that the decision below "completely abandons any pretense of requiring [R]espondents to comply with" the "significant restrictions . . . [designed] to ensure a closed system of distribution," Pet. Br. at 24, 25, it appears that Petitioner did not propose specific limitations that might have enabled the injunction to operate in a manner that better approximated what Congress is claimed to have intended.

United States v. Kabat, 797 F.2d 580, 591-92 (8th Cir. 1986), cited at Pet. Br. at 20, is not helpful to Petitioner. The essence of the medical necessity defense is not that those asserting it "'disagree with the [government's policy] decisions,'" Pet. Br. at 20, but rather that they are "confronted with such a crisis as a personal danger, a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts," *Kabat*, 797 F.2d at 591 (citing *United States v. Seward*, 687 F.2d 1270, 1276 (10th Cir. 1986)).

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a judgment, the same Congress that went on to enact the CSA passed the Marijuana and Health Reporting Act, Pub. L. No. 91-296, requiring the Department of Health, Education, and Welfare to prepare a report on marijuana, *see* 1970 U.S.C.C.A.N. 418 (acknowledging the *lack* of "authoritative . . . information involving the health consequences of using marihuana"), and when the CSA was enacted, Congress accepted the interim written recommendation of HEW: that "marijuana be retained within schedule I" pending "the completion of certain studies now underway to resolve this issue," H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4579, 4629. Then, Congress created a Commission on Marihuana and Drug Abuse, which it "directed to prepare a report to guide Congress." Pub. L. No. 91-513, § 601. Whatever reasons subsequent Congresses may have had for not heeding that Commission's ultimate recommendation – *i.e.*, that possession and distribution of small amounts of marijuana be placed beyond the reach of the criminal law – such subsequent congressional inaction cannot retroactively convert the initial, pragmatic decision of 1970 into an affirmative "declaration" or "determination." *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180-85 (1994).[5/]

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[5] The "sense of Congress" language inserted into the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 2760-61, *see* Pet. Br. at 22, hardly fills the void. Whatever effect a court might give an *unambiguous* declaration that was passed in such marginal fashion, the legislation at issue states only that "*certain* drugs are listed on Schedule I of the Controlled Substances Act if they have a high potential for abuse, lack any currently accepted medical use in treatment, and are unsafe, even under medical supervision" (emphasis added) – not that *every* Schedule I substance meets that description – and then reaffirms Congress's commitment to the Federal Food, Drug and Cosmetic Act prohibition on "the *sale* of any unapproved drug, including marijuana," *id.* (emphasis added).

Congress's longstanding appropriations for the United States government to provide marijuana to a limited class of seriously ill individuals through its Compassionate Investigative New Drug ("CIND") Program further refute an argument from the words of section 812. Had Congress really "determined" that no individual could "safely" use marijuana "under medical supervision," it is doubtful that it would have provided the substance to the scores of individuals who have participated in that Program, under doctors' supervision, for nearly a quarter century. *See Kuromiya v. United States*, 78 F. Supp. 2d 367, 372 (E.D. Pa. 1999) (noting "obvious[] tension between the government's repeated statements that marijuana has not been proven to provide any beneficial results and its decision to continue supplying it to eight individuals for medical needs").[6]

Finally, the contention that there is any basic *logical* incompatibility between marijuana's placement on Schedule I and recognition of a medical necessity defense is further refuted

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Similarly, while Petitioner might have the Court believe that Congress has made a specific finding that marijuana use has "'a substantial and detrimental effect on the health and general welfare of the American people,'" Pet. Br. at 17 (quoting 21 U.S.C. § 801(2)), the actual statutory provision quoted does not mention marijuana, but refers generally to "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances." *Id.*; 21 U.S.C. § 801(1) (finding that "[m]any of [these same substances] . . . have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people").

[6] Indeed, the CIND program was initiated to settle a lawsuit filed by a patient who, based upon a showing of medical necessity, had been acquitted of unlawful cannabis cultivation in the District of Columbia. *United States v. Randall,* 104 Wash. D. Rep. 2249 (D.C. Super. 1976); *see also United States v. Burton,* 894 F.2d 188, 191 n.2 (6th Cir. 1990) (citing the existence of CIND Program as precluding defendant's asserting necessity defense and noting fact that "after this proceeding was begun, Burton became part of [the] program and now receives marijuana for his glaucoma under a physician's supervision").

by the decisions of State courts interpreting legislation that is identical in relevant respects to the Federal CSA. *See, e.g.*, *Jenks*, 582 So. 2d at 680; *Hawaii v. Bachman*, 595 P.2d 287 (Haw. 1979); *Idaho v. Hastings*, 801 P.2d 563 (Idaho 1990). Although these decisions do not control a Federal court's interpretation of the Federal statute, they further undermine any claim that the CSA language can *only* be read as abrogating a necessity defense.[7]

II. Principles of Judicial Restraint Counsel Strongly Against an Unduly Broad Reading of the Statute.

Even if traditional tools of statutory construction yielded a less definitive answer, however, fundamental rules of judicial self-restraint and federalism would argue against giving the CSA the sweeping construction that the Petitioner insists upon here. *See Raines*, 362 U.S. at 22 (noting that courts should avoid "premature interpretations of statutes in areas where their constitutional application might be cloudy").

A. This Case Is No Occasion for Announcement of a Broad Legal Rule.

At the outset, the question of the availability of a necessity defense to a *criminal* indictment is not even directly presented in this case, and while this proceeding involves charges of

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[7] Indeed, even the handful of State court decisions *declining* to allow a necessity defense have done so on grounds that *weaken* Petitioner's statutory argument. In these cases, as in *Burton*, courts have pointed to the existence of a (State) compassionate programs as foreclosing a defendant's establishing the prerequisite absence-of-lawful-alternatives element of the necessity defense – rather than holding that lawful possession of marijuana is incompatible *per se* with placement on the equivalent of Federal Schedule I. *See, e.g.*, *Kauffman v. Alabama*, 620 So. 2d 90 (Ala. Crim. App. 1992); *Minnesota v. Hanson*, 468 N.W.2d 77, 78 (Minn. Ct. App. 1991). *See generally* Marijuana Policy Project Report, *How Can a State Legislature Allow Patients to Use Medical Marijuana Despite Federal Prohibition?*, at L-1 to L-2 (Feb. 2001) ("MPP Report").

distributing marijuana, *see* 21 U.S.C. § 841, the grounds on which Petitioner would have the case resolved – that placement of marijuana in Schedule I conclusively eliminates a defense of medical necessity – would be far more broadly applicable to cases involving, for example, simple possession for use by an individual with a serious illness. In fact, as Petitioner recognizes, the criminal law of the State from which this case arises imposes criminal punishment for distribution – but not possession for therapeutic use – of marijuana; it continues to enforce that criminal statute, including against the sort of "buyers' club" to which Petitioner takes such strong exception, *California ex rel. Lungren v. Peron*, 59 Cal. App. 4th 1383, 1387 (1997) (closing San Francisco club under State law); *cf.* 21 U.S.C. § 844a (limiting penalties for first-time offenses involving possession of "personal use amounts" of certain substances).

In fact, Petitioner has maneuvered to have this case resolved on a very high plane of generality, declining the opportunity on remand to put evidence into the record that might have persuaded the District Court to exercise its discretion to retain a broader injunction. And though Petitioner underscores the significance of "restrictions . . . [designed] to ensure a closed system of distribution," Pet. Br. at 24, 25, no modification that might better serve the legislative purpose of preventing "abuse or diversion of the drug" was presented to the District Court. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289-90 (1998) (recognizing that "judicially implied system of enforcement" should track purpose and operation of "express system of enforcement").[8]

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[8] Similarly, evidence indicating that Respondents were making marijuana available to individuals without adequate proof of necessity, *see* Pet. Br. at 35 n.16, might support a claim that the modified injunction contains inadequate safeguards, but it is not an argument against recognizing *any* necessity exception. *Cf. Washington v. Harper*, 494 U.S. 210, 235 n.13

Finally, developments to which the Briefs of Petitioner and its *Amici* point actually highlight that the broad statutory question not only *need not* be decided in this case, but may be of declining significance. *Cf. Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (*per curiam*) ("we have concluded that deciding this case would require us to resolve a constitutional question that may be entirely hypothetical, and we accordingly dismiss the writ as improvidently granted").

Thus, while *Petitioner's* arguments relate to "Schedule I substances" generally, this case in fact is concerned only with the therapeutic use of marijuana – a drug whose presence on Schedule I has an undeniably unique legislative history, *see supra*, one whose difference from other similarly classified substances has long been acknowledged, *see NORML*, including by those who administer the CSA, *see Kuromiya*, 78 F. Supp. 2d at 368-69 (discussing history of CIND program), and whose continued presence on that Schedule is the subject of a pending administrative proceeding. Indeed, Petitioner alerts the Court that the Department of Health and Human Services will soon release its evaluation of scientific evidence that others have found especially compelling.

And as Petitioner's *Amici* emphasize, the Institute of Medicine's study, while explicitly recognizing real therapeutic benefits that some derive from smoking marijuana, also predicts that the "'future of cannabanoid drugs lies not in smoked marijuana but chemically defined drugs,'" *see* Br. *Amicus Curiae* of Family Research Council at 9 (quoting IOM Report). Although the efficacy of such drugs may not be presumed – and their ultimate development will depend on market forces (and government willingness to allow research to proceed) – if the

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(1990) ("'[t]hat such a practice may take place in some institutions in some places affords no basis for a finding as to [the program at issue]'") (quoting *Parham v. J.R.*, 442 U.S. 584 (1979)).

optimism of *Amici* is well-founded, the significance of the issues presented for decision will diminish. *But cf.* IOM Report at 4 ("Although most scientists . . . agree that the pathways to cannabanoid research are clearly marked, there is no guarantee that the fruits of scientific research will be made available to the public for medical use.").[9]

B. A Restrained Construction Serves Important Constitutional Purposes.

1. This Case Implicates Issues of Constitutional Dimension.

To construe the statute as universally abrogating a medical necessity defense would run afoul of the rule that statutes should be construed – as the CSA surely may be in this case – so as to avoid, rather than invite, constitutional difficulty. *See Solid Waste Agency*, 121 S. Ct. at 683; *Vermont Agency of Natural Resources*, 120 S. Ct. at 1870; *Jones*, 526 U.S. at 239.

That rule of construction not only reflects separation of powers concerns – by presuming that legislators intend to honor their constitutional oaths – but, as this Court's decisions also recognize, it expresses a judgment that the *process of*

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[9] The advent of the fully effective alternatives would have obvious legal significance. Just as the defense to prison escape does not survive the disappearance of the condition creating the necessity, *see Bailey*, 444 U.S. at 415 (noting that escapee from prison fire is "'not to be hanged because he would not stay to be burnt,'" but holding that defense is available only to those who return) (quoting *United States v. Kirby*, 74 U.S. 482, 487 (1868)), the interest in allowing marijuana to be available for therapeutic purposes is premised on the *un*availability, for certain individuals, of an equally effective alternative.

On the other hand, the *potential* for such drugs has no relevance for the individuals whom Respondents and the State measures currently serve. *See* IOM Report at 7 ("It will likely be many years before a safe and effective can delivery system, such as an inhaler, is available for patients. In the meantime there are patients with debilitating symptoms for whom smoked marijuana might provide relief.").

constitutional adjudication itself benefits when complex questions are not prematurely resolved. *See Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring in judgment). Not only is it possible that the day for judicial resolution of an issue will not, in fact, arrive, *see id.* – legislatures might heed an emerging consensus or steer away from constitutionally sensitive approaches – but later deliberation can benefit from information about policy developments whose contours are not judicially foreseeable. *See Murray*, 492 U.S. at 14 (Kennedy, J., concurring in judgment) ("judicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures"); *cf. Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

These insights apply with special force in cases where the pertinent constitutional provision is open-ended and its interpretation dependent on discerning evolving societal standards and on ethical and scientific – as well as legal – considerations. Thus, in *Cruzan*, the Court, while recognizing that the interests involved were of constitutional magnitude, resisted announcing a comprehensive rule of law to govern the conditions under which life support from incompetent patients might be withdrawn, citing the "number of sources" available to States in considering such a "perplexing question with unusually strong moral and ethical overtones," 497 U.S. at 277.

Finally, reserving resolution of constitutional questions – in areas where both public opinion and relevant empirical facts are changing – can reinforce the premises expressed in the

Constitution's federal structure. Thus, in Justice Brandeis's classic formulation:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co., 285 U.S. at 311 (Brandeis, J., dissenting); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) ("[t]he very complexity of the problems of financing and managing a . . . public school system suggests that there will be more than one constitutionally permissible method of solving them") (internal citation and quotation omitted).

Encouraging deliberation at the State level on difficult questions – including those of constitutional magnitude – is important to the process of self-government. *See FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., concurring in part and dissenting in part) ("Citizens . . . cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a faraway national legislature."); William H. Rehnquist, 1998 Year-End Report of the Federal Judiciary, 11 Fed. Sent. R. 134, Nov.-Dec. 1998 (noting that the "pressure in Congress to appear responsive to every highly publicized social ill . . . needs to be balanced with an inquiry whether . . . we want most of our relationships decided at the national rather than the local level").

These considerations played a central role in the Court's recent decisions involving assertions of constitutional right by (and on behalf of) individuals suffering from terminal illness. Thus, in *Cruzan*, Justice O'Connor's concurring opinion explained:

> [N]o national consensus has yet emerged on the best solution for this difficult and sensitive problem. Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the "laboratory" of the States, in the first instance.

497 U.S. at 292 (citing *New State Ice Co*).

And the various opinions in *Glucksberg* and *Vacco v. Quill*, 521 U.S. 793 (1997), approached the assertions of constitutional right in similar fashion, recognizing that the issues in these cases touched on fundamental liberty interests, but that many of the questions of constitutional relevance – bearing on whether a right could be recognized, whether an asserted State interest could be accomplished through less invasive means, and whether a practicable remedy could be devised – were not yet amenable to definitive resolution. *See Glucksberg*, 521 U.S. at 745 (Stevens, J., concurring in judgment) (noting that "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly "[a]t the heart of [the] liberty" interest protected by the Constitution) (citation omitted); *id.* at 792 (Breyer, J., concurring in judgment) ("were a state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life[,]" the constitutional concerns "would be more directly at issue"); *see generally id.* at 737 (O'Connor, J., concurring) (noting "extensive and serious evaluation" of issues by States).

Whether or not these recent precedents are read as *establishing* that a seriously ill person has a right to access to marijuana or any other particular medically necessary therapy, the evidence increasingly confirms that there is an identifiable – but limited – class of very ill people for whom marijuana *does* offer real and unique medical benefits, *i.e.*, for whom the predicament hypothesized in Justice Breyer's opinion is a real

one. The interests of such individuals, whom cannabis enables to manage what would be "otherwise unavoidable physical pain" and other serious health- and life-threatening symptoms, are "of constitutional dimension[]." *See United States v. Randall*, 104 Wash. D. Rep. 2249, 2253 n.29 (D.C. Super. 1976) ("a law which apparently requires a person to submit to deteriorating health without proof of a significant public interest to be protected raises questions of constitutional dimensions"); *see also Jacobson*.[10/] It would be unfortunate to require courts and legislatures – as they would have to in the absence of any cognizable necessity defense – to consider these questions primarily through a constitutional lens. *See Glucksberg*, 521 U.S. at 788-89 (Souter, J., concurring in judgment).

Thus, the Institute of Medicine Report concluded that cannabis is "promising for treating wasting syndrome in AIDS patients" and that for them and other "patients . . . who are undergoing chemotherapy and who suffer simultaneously from severe pain, nausea, and appetite loss, cannabinoid drugs might offer broad-spectrum relief not found in any other single medication," IOM Report at 177, and within that group, "[t]here will likely always be a subpopulation of patients who do not respond well to other medications," *id.* at 3-4; *see also id.* at 154 ("for patients for whom standard antiemitic therapy is ineffective and who suffer from debilitating emisis," the "harmful effects of smoking marijuana for a limited period of time might be outweighed by the antiemitic benefits"); *cf.* S.J.

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[10] Significantly, the primary evidence of marijuana's therapeutic value is not as a *cure*, but rather as enabling individuals suffering from serious illness to better respond to and tolerate potentially life-saving conventional treatments. That point is critical in distinguishing the legal claims in cases such as this one from those in *United States v. Rutherford*, 442 U.S. 544 (1979), and *Quill*, where there was a substantial interest in protecting individuals from harm and in encouraging them to pursue promising modes of treatment and pain relief.

Gould, *It Works Like a Charm*, N.Y. Times, May 4, 1993 (describing successful use of marijuana in course of treatment for abdominal mesothelioma after "absolutely nothing in the available arsenal of anti-emetics worked at all").

2. In Diverse and Appropriate Ways, States Have Sought to Recognize and Safeguard These Interests.

There is growing sentiment – informed by this and other research, as well as by greater discussion of the dilemmas confronting individuals with terminal illness – that it is wrong to punish individuals who are seriously ill for availing themselves of relief from pain and other debilitating symptoms. As the Institute on Medicine summarized, "public support for patient access to marijuana for medicinal use appears substantial; public opinion polls taken during 1997 and 1998 generally report 60-70 percent of respondents allowing medicinal use of marijuana." IOM Report at 18. Similarly, a 1999 Gallup Survey showed that 73% favored "making marijuana legally available for doctors to prescribe in order to reduce pain and suffering." MPP Report at D1; *see also* Robert J. Blendon & John T. Young, *The Public and the War on Illicit Drugs*, 279 JAMA 827 (1998) (reporting analysis of public opinion surveys concerning medical use of marijuana).[11/]

These sentiments have been expressed not merely in public opinion surveys, but in legislation and popular initiatives at the State level. *Compare Penry v. Lynaugh*, 492 U.S. 302, 333-35

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[11] The Institute on Medicine's report also addressed the empirical evidence bearing on other questions that figure in debates over allowing access to marijuana for medical purposes, finding, for instance, that there is "no convincing data to support th[e] concern that sanctioning medical use of marijuana might increase its use among the general population," *id.* at 104 and that "there is no evidence that the medical marijuana debate has altered adolescents' perceptions of the risks associated with marijuana use," *id.*

(1989) ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures . . . . The public sentiment expressed in . . . polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.").[12]

There are now thirty States that have, in some fashion, recognized the interests of those for whom marijuana provides needed relief. *Cf. Cruzan*, 497 U.S. at 282 n.10 ("important individual interests should [not] be afforded less protection simply because the [State] government" is the party defending them). As would be expected in a federal system – one in which public health has been primarily the concern of the States, *see Jacobson* – the various States that have undertaken to recognize and safeguard these rights have done so in very different ways. In some States, as noted above, judicial decisions have recognized a narrow medical necessity defense when individuals using marijuana therapeutically have been prosecuted for violating drug laws. *See California v. Trippet*, 56 Cal. App. 4th 1532 (1997); *Jenks*, 582 So. 2d at 680; *Hawaii v. Bachman*, 595 P.2d 287 (Haw. 1979); *Idaho v. Hastings*, 801 P.2d 563 (Idaho 1990).

Fourteen others currently have statutes authorizing the administration of "therapeutic research programs," whereunder patients meeting narrowly circumscribed criteria could obtain

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[12] Although *Penry* and *Thompson* involved the Eighth Amendment's Cruel and Unusual Punishments Clause, this Court's cases have noted a substantial convergence between that prohibition and that of the Due Process Clause. *See Whitley v. Albers*, 475 U.S. 312, 327 (1986); *cf. Jacobson*, 197 U.S. at 39 ("cruel and inhuman in the last degree" to enforce compulsory vaccination statute against person with potentially lethal reaction); *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

small quantities of marijuana from private physicians and the States themselves – although these programs have foundered as a practical matter.[13] Four other States – Alaska, Iowa, Montana, and Tennessee – have amended their statutes so as to place marijuana on a schedule that recognizes its therapeutic use.

Numerous other States have enacted more frankly symbolic legislation,[14] and legislatures in six States – Missouri, Michigan, New Hampshire, California, Washington, and New Mexico – have passed non-binding resolutions urging the Federal government to make marijuana available by prescription. *See, e.g.*, Mo. Sen. Con. Res. 14 (1994); Cal. Sen. Joint Res. No. 8 (Sept. 2, 1993).

Far more attention has been given to the more thorough reforms passed in eight States (seven by popular initiative) in recent years – Alaska, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington. These laws either provide an exemption from prosecution or supply an affirmative defense to (State) charges of possession of up to a small amount of

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[13] *See, e.g.*, Ala. Code § 20-2-110; Ga. Code Ann. § 43-34-120; 720 Ill. Comp. Stat. 550/11; Mass. Gen. Laws ch. 94D §1; Minn. Stat. § 152.21; N.J. Stat. Ann. § 26:2L; N.Y. Pub. Health §§ 3328, 3397; R.I. Gen. Laws § 21–28.4-1; S.C. Code Ann. § 44-53-610; Tex. Health & Safety Code Ann. §§ 481.111, 481.201-205; W. Va. Code § 16-5A-7; *see also* Wash. Rev. Code § 69.51; N.M. Stat. Ann. § 26-2A. In almost every State, the efficacy of these programs was hampered by the cumbersome and expensive Federal review process. California has recently undertaken the most ambitious State research program. *Amicus* Vasconcellos was the sponsor of S.B. 847, which appropriated $3 million for the California Center for Medicinal Cannabis Research. *See* Cal. Health & Safety Code § 1136.9.

[14] A number have laws provide for changes in State treatment of marijuana that take effect when – but only when – *Federal* law changes. *See, e.g.*, Conn. Gen. Stat. §§ 21-a-246, 21a-253; Mont. Code Ann. § 50-32-222(7); N.H. Rev. Stat. Ann. § 318-B-9; Tenn. Code Ann. § 68-52-101; Va. Code Ann. § 18.2-250.1; Vt. Stat. Ann. tit. 18 § 4471; Wis. Stat. § 46.60.

marijuana for individuals suffering from certain defined medical conditions who have been advised by their doctor that they are likely to benefit from marijuana. Five of the States provide for registration processes for those individuals, *see* Alaska Stat. § 17.37; Haw. Rev. Stat. § 329; Or. Rev. Stat. § 475.300; Colo. Const. amend. 20; Nev. H.B. 121 (proposed), and three (Alaska, Hawaii, and Nevada) make registration a mandatory precondition to receiving the law's protections.[15/]

The caricatures and anecdotes offered by Petitioner's *Amici* notwithstanding, these recent measures, while more aggressive than prior efforts, remain confined to the area where claims of individual right are most compelling, where traditional State powers and responsibilities are at their apex, and where legitimate Federal interests are most attenuated: relieving the threat of (State) penalties for possession of small amounts of marijuana by individuals suffering from debilitating medical conditions.

Thus, these programs remain generally modest in size and are being administered in good faith, and with due respect for the laws prohibiting distribution – and possession – of marijuana for any other, non-medical reason. *See, e.g.*, *Oregon v. Arana*, 998 P.2d 688, 689 (Or. Ct. App. 2000) (affirming marijuana dealer's conviction for "the manufacture, delivery, and possession of a schedule I controlled substance," Or. Rev. Stat. § 475.992); *see also California v. Rigo*, 69 Cal. App. 4th 409 (1999) (declining to give broad interpretation to Proposition 215 protection); *Trippet*, 56 Cal. App. 4th at 1550 (same). Most provide for active monitoring and control by public health officials, and the evidence shows that they are resorted to by doctors in a conscientious and professional

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[15] Colorado and Nevada voters approved constitutional amendments on November 7, 2000. Their legislatures are now considering the implementing legislation.

manner. *See Washington v. Harper*, 494 U.S. 210, 223 (1990) ("we will not assume that physicians will prescribe . . . drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary"). Their effects are being carefully studied and debated at all levels of State government. *See, e.g.*, Report of Maine Attorney General's Task Force On Medical Marijuana (Sept. 13, 2000).

For example, in Oregon, the Health Division of the State Department of Health and Human Services has taken an active role. Some 1,700 patients have registered, as a result of recommendations by 515 doctors. In Alaska, there are 180 patients, and in Maine, 250 participants. *See* MPP Report App. F. The petitions of patients and caregivers to have different conditions recognized as eligible have been carefully considered. *See id.* at F-5, F-10.[16]

Indeed, many – including those in the law enforcement community – who expressed apprehension have been favorably impressed by the good faith with which these have been implemented. *See* Michael Pollan, *Living with Medical Marijuana*, N.Y. Times Magazine, July 20, 1997.

These measures not only fulfill the States' important role of protecting the fundamental rights of the individuals within their jurisdiction, but they provide a body of experience that can inform future deliberations in the political and judicial branches at every level. Indeed, it is a testament to the constructive and constitutionally appropriate role the States are playing that

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[16] The anecdotal focus on California, *see* Family Research Council Br. at 17-20, while understandable at one level, is, in an important sense, misleading. California's law is broader than those of other States, and has so far provided for a less active role for public health officials. *Cf. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Thus, concerns that may have some arguable force with respect to California simply have no relevance to the other jurisdictions.

Petitioner's *Amici* have included an Appendix to their brief that attempts to use comparative statistics from the fifty States to show that allowing limited access to cannabis for those with certain grave medical conditions will weaken young people's resolve to refrain from experimentation with recreational drugs. Although we doubt both the premises of that argument and the probative weight of those crude statistics, *see supra* n.11, the ability to make such comparisons and argue about their legal and policy implications is precisely the sort of "happy incident" of federalism that Justice Brandeis's opinion celebrated.

III. Courts May Consider Legitimate State Interests In Exercising Equitable Discretion.

In addition to the States' roles as constituents of the federal system, the measures discussed implicate their traditional sovereign interests and responsibilities, as well. *See Solid Waste Agency*, 121 S. Ct. at 683; *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("[f]ederal statutes impinging upon important state interests cannot . . . be construed without regard to the implications of our dual system of government") (internal citation and quotation omitted); *Parker v. Brown*, 317 U.S. 341 (1943) (interpreting Sherman Act so as not to reach anti-competitive conduct sanctioned by State law). Although the District Court did not rely on State interests in deciding on the scope of injunctive relief ordered in this case, an equity court's power to vindicate the "public interest" includes the power – and responsibility – to take account of legitimate State interests, as well. Nothing in the text of § 882 – or the structure of the Act as a whole – requires otherwise.

While an equity court must give effect to statutory policies, the law is clear that the policies expressed in any one Federal statute do not always define "the public interest." *See Village of Gambell*, 480 U.S. at 545-46 (while the "statutory interest in preservation of subsistence resources is *a* public interest," it does not necessarily "supersede all other interests that might be

at stake"); *Chrysler Corp.*, 316 U.S. at 570 (Frankfurter, J., dissenting) ("The circumstance that one of the parties is the [United States] Government does not in itself mean that the interest which it asserts defines and comprehends the public interest which the court must vindicate.").

In fact, "[w]hen the frame of reference moves . . . to a system of Federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief," *Rizzo v. Goode*, 423 U.S. 362, 379 (1976).

Although the CSA no doubt restricts the range of measures that States may implement, it is not plausibly read as divesting States of all power to pursue measures narrowly targeted to serious local public health problems. To the contrary, in statutory language no less emphatic than any relied on by Petitioner here, the Act expressly disclaims an interest in "occupy[ing] the field," providing only those State laws that are in "positive conflict" with the Federal statute should yield. 21 U.S.C. § 903.

And this Court's decisions have long recognized the preeminent role of the States in matters of public health.

> The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take.

Jacobson, 197 U.S. at 38; *see United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 154 (1944) ("At a time when great measures of concentration of direction are concededly

necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place.").[17]

As described above, many States have pursued policies that seek to protect and secure the medical needs of seriously ill individuals, without compromising the objectives of preventing abuse and diversion that Petitioner identifies as at the core of the Federal statutory concern. These initiatives pose no "serious" conflict with Federal law, and neither the substantive nor the jurisdictional provisions of the Act should be construed in a manner that might lead to their being extinguished.

CONCLUSION

For the reasons set forth above – and those presented by Respondents – *Amici* request that the judgment of the Court of Appeals be affirmed.

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[17] Indeed, the measures discussed herein reflect a further reality: that although Federal law may aspire, in Petitioner's terms, to a "closed system," marijuana remains widely enough available that individuals whose medical needs are grave enough to lead them to run the gauntlet of potential punishment are likely to be able to obtain it. Accepting that reality, the States must be accorded some latitude to decide that these individuals and the public generally will be better served by a regime that maximizes the involvement of physicians and State health officials and minimizes any role for those who traffic in illicit drugs.

Respectfully submitted,

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